

1 knowing or intentional infliction of serious injury; (2) the Arizona sentencing statute, A.R.S.
2 § 13-604.01, refers to a maximum penalty, but does not require a mandatory penalty; (3) trial
3 counsel was incompetent during plea negotiations because he lacked sufficient knowledge
4 of Arizona's criminal statutes, which resulted in petitioner waiving his constitutional rights
5 "under the guise of plea bargain stipulations"; and (4) the trial court imposed sentences that
6 violated Arizona statutes and resulted in a "violation of separation of powers" and
7 petitioner's constitutional rights.

8 The Magistrate Judge noted that Grounds 1, 2 and 4 were not raised in petitioner's
9 first state post-conviction proceeding, but instead were first raised in his second post-
10 conviction proceeding. The state court therefore concluded that these claims are barred by
11 Ariz. R. Crim. P. 32.2(a)(3) for petitioner's failure to raise them at trial or in his first Rule
12 32 proceeding. We agree with the Magistrate Judge that this state procedural ruling "is both
13 independent of the merits of the federal claim and an adequate basis for the court's decision."
14 Harris v. Reed, 489 U.S. 255, 260 (1989); see also Stewart v. Smith, 536 U.S. 856, 860
15 (2002) (holding that Rule 32.2 is an adequate and independent procedural bar). Therefore,
16 Grounds 1, 2, and 4 are procedurally barred from federal habeas corpus review. See
17 Wainwright v. Sykes, 433 U.S. 72, 91 (1977).

18 The Magistrate Judge also concluded that Ground 3, asserting trial counsel's
19 incompetence regarding Arizona's sentencing statutes, does not identify a federal claim.
20 Petitioner asserts that counsel was incompetent, but he does not cite the Sixth Amendment
21 or any other federal claim. A state prisoner is entitled to relief under 28 U.S.C. § 2254 only
22 if he is held "in custody in violation of the Constitution or laws or treaties of the United
23 States." 28 U.S.C. § 2254(a); Engle v. Isaac, 456 U.S. 107, 119 (1982). Therefore, because
24 Ground 3 is not based on a violation of federal law it cannot form the basis for habeas relief.

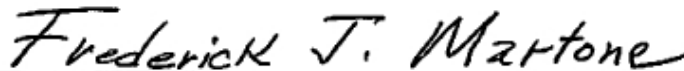
25 But even if Ground 3 is construed as presenting a constitutional claim, it would
26 nevertheless fail because petitioner did not present this particular claim of ineffective
27 assistance of counsel to the state court and therefore the claim is also technically exhausted
28 and procedurally barred.

1 Finally, we also agree with the Magistrate Judge's conclusion that petitioner has failed
2 to establish "cause" or that a failure to consider the procedurally barred claims will result in
3 a "fundamental miscarriage of justice."

4 Therefore, pursuant to Rule 8(b), Rules Governing § 2254 Cases, we have considered
5 petitioner's objections and reviewed the report and recommendation *de novo*. We accept the
6 recommended decision of the United States Magistrate Judge (doc. 18). Therefore, **IT IS**
7 **ORDERED DENYING AND DISMISSING** with prejudice the petition for writ of habeas
8 corpus (doc. 1).

9 **IT IS FURTHER ORDERED DENYING** a certificate of appealability and leave
10 to proceed *in forma pauperis* on appeal because dismissal of the habeas petition is justified
11 on procedural grounds and jurists of reason would not find the procedural ruling debatable.

12 DATED this 9th day of December, 2013.

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15 Frederick J. Martone
16 Senior United States District Judge
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